

No. 14,518

United States Court of Appeals  
For the Ninth Circuit

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NAT YANISH,

*Appellant,*

VS.

BRUCE G. BARBER, District Director,  
Immigration and Naturalization  
Service,

*Appellee.*

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APPELLANT'S OPENING BRIEF.

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FILED

MAY 12 1955

PAUL P. O'BRIEN, CLERK



## Subject Index

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	Page
Jurisdiction .....	2
Statement of the Case.....	2
Specification of Errors .....	4
Argument .....	4

## Table of Authorities Cited

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Cases	Page
Enoch Morgan's Sons Co. v. Gibson, 122 F. 420 (CA 8)...	6
Gompers v. Bucks Stove & Range Co., 221 U.S. 418.....	6
Judelshon v. Black, 64 F.2d 116 (CA 2).....	6
Leman v. Krentler-Arnold Hinge Last Co., 284 U.S. 448...	6
Norstrom v. Wahl, 41 F.2d 910 (CA 7).....	6
Parker v. United States, 153 F.2d 66 (CA 1).....	6, 7
Union Tool Co. v. Wilson, 259 U.S. 107.....	6
United States v. United Mine Workers, 330 U.S. 258.....	6
Yanish v. Barber, 211 F.2d 467 (CA 9).....	2, 5
Yanish v. Barber, 97 L.ed. 1637.....	2
Yanish v. Barber (D.C. N.D., Calif., No. 29013).....	2

## Statutes

5 USCA 1009 (Administrative Procedure Act, Sec. 10(c))	2
8 USCA (1946 Ed.) 164, now 8 USCA 1329.....	2
18 USCA 401 and 402.....	2
28 USCA 1291, 1292.....	2
28 USCA 1331 .....	2

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**APPELLANT'S OPENING BRIEF.**

---

This is an appeal (R. 8) from an order of the Court below which, while holding appellee in contempt of a prior order directing him not to impose additional conditions in a bond which had been posted by appellant, nonetheless directed that no sanctions be imposed against appellee and that no reparation be awarded appellant (R. 4-5). And this, despite the fact that as a result of appellee's contempt, appellant was forced to spend two and one-half months illegally in jail and was compelled to maintain litigation up to and including Mr. Justice Douglas to procure his release on bail.

## JURISDICTION.

The jurisdiction of the Court below is based upon § 10 (c) of the Administrative Procedure Act (5 USCA 1009); 8 USCA [1946 Ed.] 164, now 8 USCA 1329; 28 USCA 1331; and 18 USCA 401 and 402). The jurisdiction of this Court is based upon 28 USCA 1291, 1292.

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## STATEMENT OF THE CASE.

This is not the first time that Yanish has had to come to Court to obtain relief from the unlawful acts of over-zealous administrators. His last appearance before this Court resulted in an opinion (*Yanish v. Barber*, 211 F.2d 467 [CA 9]) which sets the stage for this appeal.<sup>1</sup>

In that opinion Judge Healy recites the relevant background facts which may be briefly summarized as follows:

Yanish lawfully entered the United States approximately forty years ago when he was a child of seven. He has resided here continuously ever since. In 1946 he was arrested on a deportation warrant which charged him with membership in a subversive organization. He was released upon bond conditioned according to law that he be produced when required. For some three years, during which time he complied

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<sup>1</sup>For other facets of Yanish's resistance to the efforts of administrative officers to deprive him of or to limit his liberty in a manner contrary to constitutional prohibitions, see Mr. Justice Douglas' opinion in chambers (*Yanish v. Barber*, 97 L.ed. 1637); and the injunction issued by Judge Lemmon (*Yanish v. Barber* [D.C. N.D., Calif., No. 29013]).

scrupulously with the terms of the bond, this remained his status. In 1949 appellee's predecessor sought to revise the conditions of the bond by requiring Yanish to make periodic visits to the Immigration Service. Yanish challenged the right of the Service to impose such a condition on his bond and on July 28, 1950, Judge Lemmon issued an injunction permanently restraining appellee "from requiring the petitioner [Yanish] to revise or amend the said bail bond . . ." (211 F.2d at 468).

Two and one-half years went by during which time Yanish continued to comply scrupulously with the conditions of his bond without incident. Then in March of 1953 and despite the existence of the permanent injunction of Judge Lemmon, appellee demanded of Yanish that he execute a new bond with different and more onerous conditions than were previously required of him. Upon his failure to do so, Yanish was summarily arrested, held in custody, and deprived of his liberty until he was ordered released on bail by Mr. Justice Douglas in May of 1953.

Just before his arrest Yanish had sought to obtain an order from the Court below holding appellee in contempt of Judge Lemmon's order for demanding the revision of the bond, but the Court declined even to issue an order to show cause and summarily dismissed Yanish's complaint. This Court, in the opinion already cited, held that in this the Court below was in error (211 F.2d 467, 468) and that the appropriate procedure for appellee to have followed would have been to move for a modification of Judge Lem-



mon's order. This Court observed that so long as that order was in effect, "his [appellee's] course should be to obey it" (*ibid.*, at 470). Accordingly it reversed the judgment of dismissal and remanded the cause with directions to the Court below to issue an order to show cause.

Upon the remand the Court below (Judge Hamlin) found appellee in "technical" contempt of Judge Lemmon's order (R. 4) but refused to impose any sanctions upon appellee or to award any reparation to appellant (R. 5).

This appeal is from the refusal to impose sanctions and award reparation. No appeal was taken by appellee from the finding that by imprisoning appellant he was in contempt of Judge Lemmon's order.

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### **SPECIFICATION OF ERRORS.**

The Court below erred in refusing to impose sanctions upon appellee or to award reparation to appellant.

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### **ARGUMENT.**

This appeal presents only one very simple question and it has nothing to do with internal security, or the views of appellant, or the government's program to deport subversive aliens, or any such matters. The question is this: When a respondent is found in contempt of a Court order and when the record shows that the petitioner has suffered damages as a result of



that contempt, may a trial Court refuse to impose sanctions on respondent or award reparations to petitioner?

As we have pointed out, the Court below did find appellee in contempt of Judge Lemmon's order and from that finding appellee did not appeal, so there is no question here but that appellee was so in contempt.<sup>2</sup> The sole question thus presented is whether under such circumstances and in the face of an undisputed record that as a result of that contempt appellant was incarcerated for two and one-half months and was required to litigate his right to release up to and including a Justice of the Supreme Court, the Court below erred in refusing him reparation for the losses he suffered. In this regard it must be noted that the Court below refused to award appellant any reparation whatsoever, so that we are not here concerned with the question of an exercise of discretion in fixing the amount to be allowed. The total absence of *any* award raises the question on this appeal.

The simple question thus presented has a most simple answer: The Court below was in palpable error, for it is elementary that

“If complainant makes a showing that respondent has disobeyed a decree in complainant's favor and that damages have resulted to complainant thereby, complainant is entitled *as of right* to an order in civil contempt *imposing a compensatory*

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<sup>2</sup>Indeed, it is probable that this Court's opinion in *Yanish v. Barber*, 211 F.2d 467, constitutes the “law of the case” on this point. But we need not concern ourselves with this since no appeal has been taken from Judge Hamlin's finding that appellee was in contempt.

*fine.*” (*Parker v. United States*, 153 F.2d 66, 70 [CA 1]).

This rule is of universal application and so far as we know has never been questioned. Indeed, so basic is it that few cases have bothered to enunciate it.<sup>3</sup> The cases generally turn upon a consideration of the elements of damage which properly make up the compensation to be awarded (*United States v. United Mine Workers*, 330 U.S. 258, 303-304; *Leman v. Krentler-Arnold Hinge Last Co.*, 284 U.S. 448, 455; *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 443-4; *Judelshon v. Black*, 64 F.2d 116 (CA 2); *Norstrom v. Wahl*, 41 F.2d 910, 914 (CA 7)).

The reason for the rule is, of course, clear: to compensate complainant for the loss caused by respondent's disobedience to the decree, or, otherwise put, to make reparation to the complainant injured by respondent's disobedience of the decree. When, as here, it is shown that appellee has violated the decree and appellant has suffered thereby,

“The court has no discretion to withhold the appropriate remedial order. In this respect the situation is unlike that of criminal contempt where the court in its discretion may withhold

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<sup>3</sup>See *Union Tool Co. v. Wilson*, 259 U.S. 107, 112: “. . . legal discretion in such a case does not extend to a refusal to apply well settled principles of law to a conceded state of facts.”

See also, *Enoch Morgan's Sons Co. v. Gibson*, 122 F. 420, 423 (CA 8): “Moreover, if that right was being invaded by the appellee, notwithstanding the decree, the court which entered the decree could with no greater propriety refuse relief, when the fact was called to its attention by the appellant, than it could withhold an execution to collect a judgment which it had rendered.”

punishment for the past act of disobedience. An order imposing a compensatory fine in a civil contempt proceeding is thus analogous to a tort judgment for damages caused by wrongful conduct.” (*Parker v. United States, supra*, at p. 70.)

Certainly in a tort case, if the Court found that the defendant had invaded plaintiff’s rights and that plaintiff had suffered damages thereby, there would be no “discretion” in the Court to refuse to assess damages.

For the months he spent in jail as a result of appellee’s illegal conduct, for the costs and reasonable attorneys fees required to procure his release and prosecute the contempt proceeding, Yanish is entitled to reparations against appellee. The failure of the Court below to award such reparations was clear error and requires a reversal of its judgment on that issue.

Dated, San Francisco, California,

May 11, 1955.

Respectfully submitted,

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